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MEMORANDUM

Big Law Firm, P.A.

To: Senior Partner
From: Associate
Re: Plaintiff Plutarch

Our client, Plaintiff Plutarch, has engaged our firm in hopes of recovering a balance of \$10,000 on a contract for construction he entered into with Defendant Dante. Based on the complicated factual background surrounding the agreement, there are several issues that affect the remedies we can seek for our client. The possible courses of action and the surrounding issues will be discussed below.

1) Expectancy Award based on Breach of the Contract

Based on the contract that he had in hand, our clients expectancy interest in the K was 35,000 for the completion of a building. Seemingly, this is the route our client would like us to pursue as he would be entitled to 10,000 more. There are several glaring legal issues with seeking this remedy, however. The Defendant will probably argue that there was never a valid contract in the first place since there was no mutual assent (either side thought the consideration was something different). This might be refutable. Since both parties discovered the error when the building was still under construction (when it was substantially completed), but continued to perform on the contract to the point of completion, we can argue

that the defendant ratified the terms of the contract through his knowledge, but continued acquiescence of our client's work. If this argument is successful, we may be able to bring a legal action for breach, however, we need to keep in mind that if our client chooses to pursue this route, he will be barred in equity from choosing another course of action, such as rescission, due to the choice of remedies doctrine. Traditionally, once someone has chosen to pursue a legal course of action for breach in contract, the choice to rescind is no longer available. This consideration is very important as an action for the expectancy might actually place our client on the negative side of the balance sheet based on the liquidated damages clause as it currently stands. The construction went 160 days past schedule, and the contract contained a liquidated damages clause that allotted for damages of 1000 a day past the scheduled date, totalling 160,000. There is a slight chance we may be able to avoid the clause, if we can show that it is unconscionable, but even then we still run a significant risk of liability. If we can show that the amount of damages are not reasonably correlated with the harm, a judge may deem it unconscionable. Our best argument is that the amount is excessive and functions more as punishment rather than a real, forward looking, estimate of damages. The Defendant expected to make 500 dollars in profits a day from the operation of the bath house, therefore the damages should have been reasonably ascertainable and set at that amount. It turns out that the Defendant actually is only making 300 dollars a day, however this is in hindsight and the Defendant did not have the knowledge necessary to make that determination at the time the contract was formed. Therefore the court will be disconcerted with what the actual damages were because an estimate of 500 would have been reasonable. The defendant will most likely argue that 1000 is reasonable because he had legitimate hopes of making up to that much a day. Our argument that they are unreasonably high is pretty strong, but even if the court does accept it, the outcome could still be detrimental to our client. There are three courses of action a judge could take if he finds the liquidated damages clause

unconsciousable. He could either strike it, use term fillers (which would probably be to insert \$500 a day), or find there wasn't a contract at all. The most beneficial to us would be to strike it, but this is our absolute best case scenario. Even then, our client would still probably be subject to the actual damages the defendant suffered from the delay in of the construction, which would exceed the amount the defendant owes him. Over all, this is not a practicable or beneficial remedy for our client

2) Reliance Interest

Our client may be able to seek his reliance interest at. Based on the estimate given by the auditor, the market value of our clients reliance on the contract (labor and materials) was 34,000. It is a general principle that the plaintiff should be put in the same economic position they would have enjoyed prior to contracting. This can work whether or not the original agreement is found to be enforceable. If it is enforceable, Plaintiff can sue on the contract, if it isn't Plaintiff can sue in restitution (see below). If the contract is found valid, the problem of liquidated damages will certainly arise. Also, since reliance emphasizes unjust enrichment as the cause of action, and the defendants gain as an indicator of recovery, the defendant will probably argue that his benefit is disproportionate because the real estate increased only 22,000 in value. However, this is probably immaterial, the fact of the matter is he benefited from the transaction. Even if the court buys the argument that he did not benefit based off pure economics, the holding in *Farash v. Sykes* seems to suggest that it doesn't matter, the concern is placing the P back in their rightful spot and therefore an argument can be made for the return of what our client invested, which is about 34,000. See below for if it is found not to be a valid K.

2b) Restitution of the K.

As briefly mentioned above, if we choose to argue there was not a valid agreement, we may be able to seek restitution of the contract through rescission. This may be the best course of action for us as it avoids liquidated damages. It should be fairly easy to show there wasn't a valid contract either based on the rationale of mutual mistake (both parties thought, in good faith, that the terms specified something different- the mistake was material because it concerned the consideration) or possibly even that the contract was based in fraud, although it wasn't the fraudulent acts of either of the parties to the contract. If we can show that there was no contract based on mistake or fraud, the remedy of rescission of the contract is available. This would basically allow each party to return to the other what was invested in the K, and just act as if it had never happened. Our client would therefore be entitled to whatever he put into the contract, which is 34,000 less the 25,000 he has already been given. This would do away with the liquidated damages problem, since there would be no more liquidated damages clause. The foreseeable problems are that the contract was completed, so once again, the Defendant might argue ratification. Based on the available remedies though, this would be our best option, and would get our plaintiff close to what his expectancy was.

Conclusion

Based on the available remedies to our client, the most successful option would be to try to declare the contract invalid based on mutual mistake or fraud, and rescind the contract, retracting the benefits conferred on the defendant and avoiding the penalties of the liquidated damages clause.

Question #1 Final Word Count = 1219

Question #1 Final Character Count = 7249

Question #1 Final Character Count (No Spaces, No Returns) = 5921

2)

MEMORANDUM

Big Law Firm, P.A.

To: Senior Partner

From: Associate

Re: Peter and Paula Peterson

Peter and Paula Peterson come to us seeking legal advice concerning several issues.

A) The Trees

Mr. and Mrs. Peterson are concerned that a neighboring logger is going to cut down trees that have specific monetary and sentimental value to them. It is disputable whether these trees are actually located on their land or on their neighbor's land. They would like to know what remedies are available to them

1) Injunctive

Ideally our clients would like to prevent the trees from being cut down. There are two means of

injunctive methods we might be able to take.

a) Preventative Injunction

The standard for getting a preventative injunction is pretty high. First, we must show clearly that there is a real possibility of an irreparable injury that there is no remedy at law for as a result of someone else's act. Then, that there is a real and substantial danger the the act will actually occur (imminency).. As to the first element, it really depends on whose property the trees are on. It seems like legally speaking, the Petersons should have a claim to the property, since they have a deed, and at the very least, a claim to adverse possession based on the fact that they use the trees and the land and have been for generations. If it can be proven that this is not their land though, then they cannot be injured by damage to the trees. If it is their land, there is no doubt that there will be an injury, the reparable aspect of it may be more difficult to show though. We would have to show that money damages would not be adequate. This would be difficult based on the fact that the profits they gained from the syrup sales are fairly easily discernable, and since it is sales which are quantified in terms of money, money damages would seemingly be appropriate. However, there is precedent to show that some courts have viewed trees as more than objects, placing them in the classification of heirlooms. See. Pardee v. Camden Lumber. If we can convince a court that, based on the value to our clients, these trees are more like heirlooms (e.g. wedding tree, the promise) and are therefore irreplaceable with money damages, we may be able to meet the irreplaceable damage requirement. The second aspect will be easier to prove, although the neighbor backed off when approached, there is a reasonable reason to think he will be back to cut the trees, since he is a logger, has already attempted to, and thinks he owns the land. There is precedent to support an awarding of a preventative injunction in such situations, so the odds of us getting this

injunction are good

b) Preliminary Injunction

If it turns out that there is a legitimate dispute about who owns the land, a preliminary injunction to keep the trees from being cut down while the trial happens might be an available option.

Preliminary injunctions are granted based on a balancing of several factors, one of them being an irreparable injury (as discussed above), the others being the P's likelihood of success at trial, and the ration of hardships to the parties. Whether the Petersons are likely to prevail at trial on a property dispute requires more facts, but as discussed above, it seems like they have a good claim to at the very least, adverse possession. The hardship balancing would also require more facts. Undoubtedly the inability of the logger to cut down the trees is going to result in a loss of profit or income for him, but if the trees are cut the Petersons will also lose their syrup money which is really the only profitable thing on their farm. Preliminary injunctions are harder to get, and a judge will probably apply Posner's formula, in which the costs of harm and potential outcomes at trial are weighed against each other. If the logger isn't suffering some extreme hardship though, there is a chance the Petersons can get a preliminary injunction in the case of a dispute over land ownership.

2) Remedial

In the case that we can't get an injunction, unfortunately, our clients may have to settle for money damages resulting from the cutting of the trees. These remedies would stem from tort law, and would encompass both trespass and damage to property (providing they own the property). In this case, the Petersons could recover for the economic harm they suffered from

the loss of the trees (there was an impact that is trespassing and cutting down), damages for trespass (which are usually subjective and up to the jury, how much is it worth to have your property secured), the cost of the damage to the land (can either be in replanting trees, the costs of the trees, or diminution in value, the cheapest if they are grossly disproportionate) and perhaps even punitive damages if there is no statutory bar and the tort was found to be intentional and with malice. A jury would most certainly find in favor of the Peterson's if it was in fact their property, the amount of damages may not be exactly predictable, but they would be compensated.

Declaratory

3) another alternative, if there is a real issue as to who has what rights regarding the property, the Peterson's may be able to seek declaratory relief from the court which would state who has the rights. This is much easier to get than an injunction, and should be granted by a court of equity whenever there is actually a case or controversy that it would terminate uncertainty in. There is no need to prove that the injury would be irreparable, but, there is also no enforcement power accompanied with it. However, if declaration comes out that the Petersons have the right to their property and the logger doesn't, and then the logger begins cutting down the trees anyways, it will be much easier for the Peterson's to get a preventative injunction against him.

Question #2 Final Word Count = 1014

Question #2 Final Character Count = 5925

Question #2 Final Character Count (No Spaces, No Returns) = 4797

3)

B)

Injunction

Be it known by this decree that David Doolittle is hereby enjoined as listed below based on the following circumstances:

Mr. Doolittle trespassed onto the property of Mr. and Mrs. Peter Peterson unbeknownst to and against the express will of the property owners. Mr. Doolittle had before this occasion expressed his intent to cut down trees on the property, also expressing an erroneous belief that the property belonged to him. Upon the trespass, Mr. Doolittle cut down 50 maple trees that were located on the Peterson's property. Because the entering onto the property and the cutting down of the trees by Mr. Doolittle constituted trespass and damage of property, Mr. Doolittle is permanently enjoined from engaging in the following behavior in the future, enforceable by the contempt powers of this court:

1) Mr. Doolittle is prohibited from entering onto the property of Mr. and Mrs. Peterson without express permission of the property owners

2) Mr. Doolittle is further prohibited from cutting trees on the Peterson's property.

MEMORANDUM

Re: Remedies available for Peterson's besides injunction

A) Disgorgement

The Peterson's may be able to sue under an equitable theory of restitution for disgorgement, which would allow them to recover what was taken from them (through monetary means) as well as the profits David made off the harm. The amount of this would depend on creative lawyering and arguments for damages. This would mean that whatever David got when he sold the trees (not specified) would be given back to the Petersons. David would have the burden of showing if there was any overhead costs to reduce the costs by, but we could argue that he did the work himself, similar to the farmer in *Decauter v. Young* where there was found to be no overhead expenses since he did the work himself, there was no overhead. This would probably be an easy remedy to get, but not the most effective for our client

B) Tort Damages

There are several ways tort damages could be measured. First, for the trespass, the court would have to figure out how much the value of the harm was. This would be similar to the *Hathalay* case, and there is some room for argument here. The basic principle to keep in mind is that the Peterson's should be restored to the position they were at had they not been

harm. David is likely to argue that if they had not been harmed, they would have had 50 more trees in the ground valued at 3000 each, so that should be the remedy. We could in turn argue that the market value at the time the trees were cut became 5000 each, because they were converted into logs and that's what we should get. Further, we would argue for economic loss as provided by the direct physical impact of the trees, presenting the loss of income from the syrup. Since each tree produced one gallon of syrup which had a market value of \$50 per year, we would argue that the cutting of the trees caused the Petersons a loss of \$50 per tree extra, and would multiply that by the estimated sap producing life of the tree. This amount would surely be capped by the court in terms of time, but it can get our client some extra damages.

Also, we might be able to argue that David's acts inflicted emotional distress onto Peter which manifested themselves in a diagnosable physical injury,, resulting in him going to the hospital. This is a stretch, but we may be able to sue for the medical bills (irrespective of whether Peter had health insurance due to the collateral source rule) and pain and suffering. This would probably be the only way we would be able to recover for pain and suffering since such awards are normally not given for destruction to property. If we could prove that David trespassed on the land intentionally and with malice, we may be able to recover punitive damages. David will probably argue that the trespass wasn't intentional because he, in good faith, thought he owned the land.

We may be able to recover for any other legitimate costs the Peterson's incurred as a result of the trespass and property damage. The court will probably award the highest valuation on the trees considering the factual circumstances surrounding the case and the conduct of David. Also, the economic damages will most likely be awarded, but the duration of time will be questionable. The infliction of emotional distress claim and punitive damages will be much

harder, since in general, the court disfavors and is hesitant of both, so the burden of proof is very high. The pain and suffering approach will almost certainly not work if tried, but if we could find a legitimate number and provide reasoning, the court may be open minded.

Question #3 Final Word Count = 810

Question #3 Final Character Count = 4773

Question #3 Final Character Count (No Spaces, No Returns) = 3852

4)

C)

As David's conduct has become particularly egregious, the Peterson's have more options for remedies.

1) Compensatory Contempt

Because David has blatantly and egregiously violated the permanent injunction entered against him, the court can use its contempt powers to help remedy this situation. Since this case is civil, there are two kinds of contempt the court can exercise, coercive and compensatory. Since the order against David was prohibitive and not mandatory, there's really nothing to coerce him into doing, instead, compensatory contempt is appropriate. In this case, the court can force David to pay for the damages resulting from his disobedience of the injunction. In order

to avoid an unconstitutional imposition of criminal penalties through civil means, the court will require a showing of damages. Here is where our client can fare the best. There are several ways we can present damages to the court. As outlined in the previous memo, the valuation of the trees can be determined in several manners, it is in our client's best interest to have them valued at what they're market value for making high end guitars and as logs rather than the value of the tree in the ground. (10 trees at 25,000 each, the others at market price of 5,000 versus 3,000 each) Creatively, we may also be able to argue that each tree had a market value of 20,000, since that's what David offered to pay the Peterson's earlier. If the court agreed, this would be a substantial award for our clients. Also, economic damages could be presented again, as well as diminution in value of their farm. The court may also consider attorney's fees. The court is sure to award this remedy, and will probably be very harsh on David since he outright violated the order and disrespected the judicial system.

2) Disgorgement

Once again, the Petersons could seek to take all the benefit that David got from their trees. This would probably be very high since David is selling them at a high price.

3) Tort

The same damages as discussed in the previous memo would be arguable to the Peterson's (besides emotional distress and physical harm since there is no physical manifestation), but this time punitive damages are much more certain to occur. There is no doubt that David did this intentionally, and with malice. His conduct was extremely reprehensible, as he has already been punished and enjoined by the court for engaging in

such behavior once before. Further, this time there was no good faith belief that he owned the property. The deterrent need for punitive damages in this case is also pretty high. Its clear that normal remedies are not keeping David from stealing the Peterson's property, as long as he is making a lot of money from selling them, he continues to do so. His personal wealth, while the base level of it is unknown, has been substantially (if only temporarily) increased as a result of his trespasses and conversion. The only seeming way to stop him is to make it less profitable to steal than it is to steal, and this would require an imposition of punitive damages. While the jury could probably not exceed a double digit ratio, and most likely would keep it around 1:1 as compared to the damages, this would still be a substantial amount to an individual. The court might also be more open to hearing arguments for pain and suffering caused by the trauma of having their property vandalized again, and the constant fear of it happening again. While pain and suffering normally stems from a physical injury, a compelling argument could be made for its extension (like the original ruling in Hetherly - which got overturned). The easiest measure of arguing pain and suffering in this case would probably be just a lump sum, as the others (unit of time, market value of injury, disfavored golden rule) focus on the physical injury

4) Attorney's Fees

-attorney's fees may be requested since the conduct of David is particularly egregious.

Question #4 Final Word Count = 673

Question #4 Final Character Count = 4018

Question #4 Final Character Count (No Spaces, No Returns) = 3279

5)

D) There are several courses of action Peter and Paula can take.

1) First they can argue for the Hathaley principle, and request the market value taken for the trees. Regardless of what David did with them, on the market, 10 of the trees were worth 25,000 and 39 were worth 5,000. All of the other tort principles discussed on the previous page apply also. They may be also to argue for increased economic loss, although this would be difficult. Paula could say that the removal of the trees led to decreased income which led to her not being able to feed her cows which then led to property destruction (cows died) and loss of income from the milk. This is really a stretch, and there normally must be some sort of direct causation between the harm and the economic harm. Similar to the case where there was a pesticide spill in a bay and seafood dealers tried to recover for economic loss, although it was the person who spilled's fault, the chain of causation was too remote. Also, such a ruling would lead to double recovery, since the fisherman would recover for the same dead fish the dealers would (in theory). Similarly here, Paula already would have recovered for the loss of the syrup, so allowing for that loss to affect and cause another and then compensating for that also would be a form of double recovery. It also may be argued that the marriage tree was irreplaceable and of special value, and the David knew this, so they jury can come up with a number not based on market value, but rather on testimony of its intrinsic value.

2) Contempt (see previous page)

3) Paula can also seek an accounting of the profits based on David's house using a precedent from Sheldon and Hamil America. First, the court would determine which overhead expenses were implicated by the production (indirect and direct), this burden would be on David since he intentionally did this, and therefore the court would apply a more strict interpretation of measuring profits.

David made 200,000 of revenue off of the sale of his house. His qualified expenses were 5,000 in supplies, plus the apportioned part of running his shop. The shop cost 5000 to run over ten days, and only half of that was attributable to the building of the house, so the amount that should be apportioned is half of 5000, or 2500. Thus the total expenses attributable are 7500. Subtracting the expenses from the revenue, there is 192,500 worth of profit. This has to be further apportioned based on the costs of the trees used. The trees were worth 50,000 and the total cost of construction was about 100,000, thus the boards were about 1/2 of the building. Therefore the profits should be reduced by one half, and this is the amount, through this remedy, that Paula would get, a total of 91,250. A court would award this to Paula no problem, but she could get far more from tort damages basing the market value off what the trees could actually sell for, combined with economic loss and property damages, and punitive damages.

4) Wrongful Death

Paula may have a claim for wrongful death against David for the death of her husband. She could argue that David knew Peter was in bad health and that the trees upset him, David also knew that the wedding tree had special significance, and could have reasonably anticipated that his tortious act in cutting it down would result in a manifestation of physical harm to Peter (the causation might be difficult to prove). An award for wrongful death would cover Peter's funeral expenses and compensation to Paula and any children they may have had for support. Also,

depending on the jurisdiction, Paula may be able to recover for loss of society (love, consortium) and for the grief she experienced.

5) Emotional Distress

Since Paula watched Peter get injured, she may be able to recover tort damages for emotional distress from Peter.

6) Property Damages - tort

-Diminution in value without the trees

Attorney's Fees

-since egregious conduct

Question #5 Final Word Count = 693

Question #5 Final Character Count = 4015

Question #5 Final Character Count (No Spaces, No Returns) = 3262

END OF EXAM